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In the Supreme Court of the United States

WILLIAM W. WILKINS, Tax Commissioer for the State of Ohio, et al.,

Petitioners,

v.

CHARLOTTE CUNO, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, IN SUPPORT OF PETITIONERS STATE OF OHIO and CITY OF TOLEDO

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INTEREST OF *AMICI CURIAE*[1]

The National League of Cities ("NLC") is the country's largest and oldest organization serving municipal government, with more than 1,600 direct member cities and 49 state municipal leagues, which collectively represents more than 18,000 United States communities. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, and to serve as a national resource and advocate for the municipal governments it represents.

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization consisting of more than 1,400 member entities. Its membership is comprised of local governments, including cities and counties, and subdivisions thereof as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities.

IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA's Legal Advocacy Program serves municipalities by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as friend of the court on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

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[1] Counsel for a party did not author this brief in whole or in part, and no person or entity other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of *amicus* briefs and have filed letters of blanket consent with the Clerk of the Court.

SUMMARY OF ARGUMENT

The Sixth Circuit's decision relies upon a faulty distinction between coercive and non-coercive tax incentives that does not fit within the national economic framework as applied by this Court in its Commerce Clause jurisprudence. Claims of economic discrimination caused by coercive incentives based on location are unsustainable because the Commerce Clause, as originally intended, has helped create a robust national economy comprised of interconnected local economic regions (LERs). The dynamic U.S. economy is, in practice, a common market of LERs, most of them centered on metropolitan areas.[2]

Federalism assigns to this Court the responsibility for setting the appropriate bounds of authority, which includes preventing the lower federal courts from improperly encroaching on the sovereignty of States and their political subdivisions to control their economic development and tax policies. The Framers – themselves legislators in the Continental Congress - assigned responsibility for economic matters under the Commerce Clause with the elected legislature, not the appointed judiciary. U.S. Const. Art. I §8, cl.3. Legislatures govern the use of economic development tools like investment tax credits (ITCs) that help revitalize local economies, create much-needed jobs, and generate revenue that enable states and cities to provide essential services.

In this case, Ohio law granted an ITC to qualifying corporate taxpayers that made new or expanded existing physical plant investments in Ohio. DaimlerChrysler's

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[2] Barnes, William R., and Ledebur, Larry C. *The New Regional Economies – The U.S. Common Market and the Global Economy*, 5 and 28 (1998).

decision to expand its Toledo plant qualified for an ITC. The company's actions helped create new jobs and tax revenues. DaimlerChrysler's decision also helped to create new jobs and tax revenue elsewhere because it is a global corporation with worldwide operations, headquartered in Michigan, which sells motor vehicles everywhere, not just in Ohio. The company's economic effects reverberate both forward and backward throughout LERs.

Assuming, arguendo, certain location-based incentives discriminate against interstate commerce, legislative protections already exist to correct violations.

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION RELIES UPON A FAULTY DISTINCTION BETWEEN COERSIVE AND NON-COERSIVE TAX INCENTIVES THAT DOES NOT FIT WITHIN THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE.

Should this Court deny certiorari, the Sixth Circuit's prohibition on ITCs would have the unintended consequence of promoting protectionism, thereby undermining the intent of the Commerce Clause.

A. Cities like Toledo are threatened today more by economic competition from Toronto or Taipei, not Tucson or Trenton.

The national economy is comprised of interconnected LERs.[3] Restricting the variety of economic development tools available would impose an unfair burden on some while providing and unequal benefit to others because states and cities use incentives in different combinations according to

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[3] Barnes & Ledebur, *supra* note 2, at 5.

their unique economic and legal conditions.[4] Prohibiting the use of location-based incentives ignores the reality that political boundaries cannot stop the powerful flows of commerce and capital.

The Constitution expressly authorizes Congress to "regulate Commerce with foreign nations and among the several states." U.S. Const. Art. I §8, cl.3. The negative aspects of the Commerce Clause implicitly limit States' rights to establish economic barriers within the United States, and instead promote "an area of trade free from interference by the States." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977). The original purpose of the Commerce Clause and its negative aspect was to stop protectionism among the states that would frustrate the purpose of a national economy and create economic "Balkanization" among them. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) ("[T]he Commerce Clause...reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the

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[4] In its support of re-hearing before the Sixth Circuit, Brief of the International Union, United Automotive, Aerospace, Agricultural Implement Workers of America, UAW as *Amicus Curiae* in support of Appellee's Petition for Rehearing at 5-6, *Cuno et al., v. DaimlerChrysler Corp., et al.*, 386 F.3d 738 (6th Cir. 2004) (No. 01-3960), *rehearing en banc denied* (Jan 18, 1005) ("UAW Brief"), argued that "historically, the various states' economies have developed differently and to a certain extent those differences are regionally related....What the panel's decision has done is to take a tool away from the state of Ohio .... Because the states find themselves in different positions in terms of what they may offer to encourage a business to invest locally, the inevitable result of the panel's decision is to place a state like Ohio, that relies more heavily on tax incentives, at a disadvantage compared with a state that may employ other incentives like infrastructure improvements and investments in training, incentives that are not affected by the panel's decision."

conviction that ... the new Union would have to avoid the tendencies toward economic Balkanization that had plagued the relations among the Colonies and later among the States under the Articles of Confederation.")

While the Commerce Clause is a limit on state power, when asked to judge between the national interest in fair trade and the interests of states to exercise their legitimate taxing power, this Court's Commerce Clause jurisprudence invokes a "a sensitive, case by case analysis of purposes and effects." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994). The Sixth Circuit's decision violates the general principles outlined by this Court when reviewing challenges to state taxing power. The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only [discriminatory] action of that description in connection with interstate commerce. *New Energy Co., Indiana, v. Limbach*, 486 U.S. 269, 278 (1988).[5] Likewise, where state statute regulates even-handedly to advance a legitimate local public interest and its effects on interstate commerce are but incidental, this Court would uphold the statute unless the "direct" burden imposed on commerce is "clearly excessive in relation to the putative local benefits." *Loren J. Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

In the context of tax policy, a state tax provision satisfies the requirements of the Commerce Clause if: (1) the activity taxed has a substantial nexus with the taxing State; (2) the tax

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[5] This Court outlined how a state tax provision that violated the Commerce Clause may survive strict scrutiny. *Id.* at 274. The saving test requires proof that the challenged tax provision serves a legitimate local purpose that is unachievable by reasonable non-discriminatory alternatives. *Id.* at 278.